No. 17-204

IN THE

Supreme Court of the United States

APPLE INC.,

Petitioner,

v.

ROBERT PEPPER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF ACT | THE APP ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CASES

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Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson, 523 F.3d 1116 (9th Cir. 2008).....20, 21, 23

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In re Apple iPhone Antitrust Litig., No. 11-CV-06714-YGR, 2013 WL 6253147 (N.D. Cal. Dec. 2, 2013), *rev'd and remanded sub nom. In re Apple iPhone Antitrust Litig.*, 846 F.3d 313 (9th Cir. 2017).....19, 21

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Petrella v. Metro-Goldwyn-Mayer, Inc., 134 S. Ct. 1962 (2014).....1

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United States v. Microsoft Corp.,
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STATUTES AND OTHER AUTHORITIES

15 U.S.C. § 15(a).....15

Rule 12(b)(6).....15

ACT | The App Association, *The Symbiotic Relationship Between App Developers and Platforms: A Ten-Year Retrospect*, Website (last checked, August 7, 2018).....21

Adam Jaffe & Benjamin Jones, *The Changing Frontier: Rethinking Science and Innovation Policy*, National Bureau of Economic Research (2015).....9

Dan Russell-Pinson, *OMG! Someone Copied My App. What Do I Do Now?*, ACT | The App Association (August 30, 2017).....14

Deloitte, *The App Economy of the United States: A Review of the Mobile App Market its Contribuiton to the United States*, Report (forthcoming 2018).....7, 8, 10

Cited Authorities

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Erik Brynjolfssn & Michael Smith, ***Frictionless Commerce? A Comparison of Internet and Conventional Retailers***, MIT (1999) 12

Hugo Delgado, ***The App Economy Forecast: A $6 Trillion Market in the Making***, App Annie (2017) 11, 22

Kelly Johnson Swan, ***United States: The True Cost of Defending Against Copyright Infringement Litigation***, Scott & Scott LLP (August 19, 2015) 14

Ketan Pratap, ***Apple Says Developers Earned Over $70 Billion Since App Store's Launch***, Gadget 360 (Jun. 1, 2017).....11

Milton Handler, ***Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977***, 77 Colum. L. Rev. 979 (1977).....16

Roya Stephens & Adarsh Mahesh, ***State of the App Economy***, ACT | The App Association (2018) 3, 5

Sarah Perez, ***Paid Apps on the Decline: 90% of iOS Apps Are Free, Up From 80-84% During 2010-2012, Says Flurry***, TechCrunch (Jul. 18, 2013).....22

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Steve Young, ***Making $1.5 Million with Educational Apps with Pierre Abel,*** App Masters (Apr. 30, 2015) 10

Stew Chyou, ***The History of Shareware,*** Thunderbolt (May 5, 2011) 12, 13

TEDx Talks, The New Startup Economics: Stephen Forte at TEDxHKUST, Youtube (Apr. 2, 2013) 9

Timothy F. Bresnahan, Jason P. David, and Pai-Ling Yin, ***Economic Value Creation in Mobile Applications,*** UNIVERSITY OF CHICAGO PRESS (July 2015) 8

Zack Whittaker, ***Millions of Steam game keys stolen after hacker breaches gaming site,*** ZDNet (2016), ... 13

INTEREST OF *AMICUS CURIAE*[1]

ACT | The App Association ("App Association") is an international grassroots advocacy and education organization representing more than 5,000 small app developers and technology firms in the digital economy. It is the only organization focused on the needs of small business innovators from around the world. The App Association advocates for an environment that inspires and rewards innovation while giving resources to help its members leverage their intellectual assets to raise capital, create jobs, and continue innovating.

The App Association has participated as an *amicus curiae* in the Supreme Court and other courts in cases related to antitrust and technological innovation. *See, e.g., Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc) (per curiam). Technological innovation plays a critical role in enhancing competition and improving the welfare of consumers; therefore, the App Association has a keen interest in ensuring courts properly apply federal antitrust law to the dynamic industries and innovative technologies that drive the app ecosystem. The App Association's members rely on app platforms give innovative products and services to

1. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part and that no person other than amicus and its counsel made a monetary contribution to its preparation or submission. Both parties have consented to the filing of this brief.

billions of consumers in the United States and around the globe. If the Ninth Circuit's ruling stands, it will directly affect the viability of app platforms, as well as developers' ability to give services.

SUMMARY OF ARGUMENT

ACT | The App Association ("the App Association") urges the Court to overturn the Ninth Circuit's decision in this case on the basis that Respondent's case relies on the misguided assumption that they are direct purchasers of Petitioners. As an association that represents actual developers who rely on platforms such as the Petitioner's App Store, we find the Respondent's characterization of the relationship between platforms and app developers to be factually inaccurate and disingenuously self-serving, especially their blatant disregard for how our members structure their pricing for their innovative products.

Today, the app economy represents $568.47 billion of the United States' economy and has 317,673 companies active in the U.S.'s mobile app market; the app economy is also responsible for creating 5,744,481 American jobs. The App Association has long believed that agency-sale relationships are procompetitive arrangements that lower costs for consumers and has contributed to the app economy's success. The agency-sale approach gives independent app developers autonomy and flexibility in how they offer their apps to consumers, whether it be free with in-app purchases, subscription-based sales, one-time purchase, etc. *See* App Store Guidelines. Successful app platforms, like Petitioner's App Store, have revolutionized the app ecosystem by providing app developers with eased access to a much broader swath of consumers and

platform users, resulting in a flourishing app economy that has enabled our members to grow and create 4.7 million American jobs. *See* Roya Stephens & Adarsh Mahesh, *State of the App Economy*, ACT | The App Association (2018) Available at: http://actonline.org/wp-content/uploads/ACT_2018-State-of-the-App-Economy-Report_4.pdf. The App Association implores courts and lawmakers to avoid disrupting the symbiotic and pro-consumer relationship that exists between app developers and app platforms.

In the instant case, the Ninth Circuit completely ignored how our members interact with various mobile platforms by suggesting that Petitioner owns and controls the relationship with our members' customers. This implies that platforms serve more as resellers of apps it hosts on its platform and, thus, allows them to dictate the price of those apps to consumers. To assist this Court, we explain and explore the realities of the relationship between app developers and app platforms. Additionally, we examine the net effects on American consumers; and why, ultimately, the Ninth Circuit's interpretation of this relationship, at the core of the matter at hand, is misguided and, if upheld, could damage and disrupt an ecosystem that has demonstrated significant societal value.

Moreover, the Ninth Circuit's interpretation of consumers as direct buyers from the Petitioner incorrectly assumes the Petitioner has ownership rights in app developers' apps. To draw this conclusion, the Ninth Circuit relies on its misunderstanding of the agency-sale relationship app developers have with platform owners. In reality, the Petitioner is only entitled to the agreed upon percentage of the app developers' app fee. Aside

from this fee, the Petitioner has no ownership rights to the app. In addition, app developers can offer their apps on platforms not owned by the Petitioner, unencumbered by the Petitioner. All creative rights solely belong to the app developer and are uninhibited by the Petitioner. Moreover, when a consumer agrees to the "terms of service" for each app he or she buys, the app's developer keeps sole responsibility for any breach of those terms. App developers are also solely responsible for any disruption in their service because of a lack of integrity in their code, and the onus is on them to fix it. Thus, the Ninth Circuit appears to be confused as to what or from whom the consumer is buying when they purchase an app. By any estimation, it is clear that the consumer is the app developer's customer, not the platform's.

The Ninth Circuit also is indifferent as to who sets the prices of apps. Again, this point is undisputed from our perspective: the app developer sets this price. The Petitioner is not making app developers set a price for the consumers who purchase their apps through the App Store platform, which is categorically inaccurate. Moreover, this interpretation, in effect, misappropriates and confuses who pays for what in the app economy, which is precisely what *Illinois Brick* sought to prevent from happening.

At the heart of the *Illinois Brick* doctrine, this Court expressed concern of indirect purchasers taking issue with upstream negotiations and providing indirect purchasers the ability to object to the negotiated price from upstream agreements to which they were not a party. Central in an *Illinois Brick* analysis is examining where the direct contractual relationship exists; put another way: who is selling to whom. As a result, for purposes of

antitrust standing, people or entities can only sue those companies that have direct control over the product and its pricing.

For these reasons, we respectfully request the Court overturn the Ninth Circuit's decision in this case.

ARGUMENT

I. The Ninth Circuit Factually Ignoring the Procompetitive Agency-Sale Relationship App Developers Have with App Stores Fatally Skews its Reasoning and Conclusions

The app ecosystem has developed alongside the rise of the smartphone and has experienced substantial growth in its less than ten years of existence. Small-to-medium entities (SMEs) are leaders in the $950.6 billion app ecosystem that has revolutionized the software industry and influenced every sector of the economy, representing approximately 4.7 million American jobs. Roya Stevens & Adarsh Mahesh, *State of the App* Economy, ACT | The App Association (2018) at http://actonline.org/wp-content/uploads/ ACT_2018-State-of-the-App-Economy-Report_4.pdf (App Economy Report). To facilitate the rise of the internet of things (IoT)[2], trusted and curated app stores will be vital to providing the apps that serve as the interface for IoT devices. The opportunities and potential for IoT will hinge on the app economy's continued innovation, investment, and growth.

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2. IoT is an encompassing concept where everyday products use the internet to share data collected from sensors, enabling greater efficiency in processes, products, and services across every sector.

The App Association has long believed, and our experience for over a decade demonstrates, that agency-sale relationships are procompetitive arrangements that lower costs for consumers in the context of software apps. Brief for ACT | The App Association as Amicus Curiae, p. 11, *Apple, Inc, v. U.S.*, Case No. 15-565 (2015). The agency-sale approach gives independent app developers autonomy and flexibility in how they offer their apps to consumers, whether it be free with in-app purchases, subscription-based sales, one-time purchase, etc. *See* App Store Guidelines. Successful app platforms, like Petitioner's App Store, have changed the app ecosystem, which provides app developers with ubiquitous access to a far broader swath of consumers and platform users worldwide than could be reached through the sole efforts of the developer. This scenario has led to a flourishing app economy that has benefited our members and consumers both. Chuck Jones, *Apple's App Store Generating Meaningful Revenue*, FORBES (Jan. 6, 2017, 2:10 PM), https://www.forbes.com/sites/chuckjones/2017/01/06/apples-app-store-generating-meaningful-revenue/#305d93011eb6 (reporting developers receiving $20 billion in revenue). The App Association implores courts and lawmakers not to disrupt the symbiotic relationship existing between these two entities.

In the instant case, the Ninth Circuit completely ignored how our members interact with various mobile platforms by suggesting that Petitioner owns and controls the relationship with our members' customers. This implies platforms serve more as resellers of apps it hosts on its platform and, thus, allows them to dictate the price of those apps to consumers. To assist this Court, we explain and explore the realities of the relationship between app developers and app platforms, and the net

effects on American consumers; and why, ultimately, the Ninth Circuit's interpretation of this relationship, at the core of the matter at hand, is misguided and, if upheld, could damage and disrupt an ecosystem that has demonstrated significant societal value.

A. The benefits of the symbiotic relationship between app developers and app platforms

The relationship between platforms and app companies is mutually beneficial, and one that should be fostered and supported. Not only do platforms provide app companies with secure market access, consumer trust, developer autonomy, dispute resolution, and meaningful consumer analytics; they provide a vital resource to bring the ingenuity and innovations of app companies to consumers around the globe. *See* App Economy Report. Further, the developer-platform partnership is procompetitive and lowers costs for consumers. These relationships provide app developers with a significant amount of disintermediation to reach consumers around the globe without having the developer forfeit the ability to control their business and pricing structure. *See* Deloitte, ***The App Economy of the United States: A Review of the Mobile App Market its Contribution to the United States***, Report (forthcoming 2018) (finding that "app stores do not set the prices of apps, this decision being the sole prerogative of developers") (Deloitte Study).

1. Platforms lower overhead costs that simplify market entry

Before centralized platforms, app developers were forced to absorb significant costs and manage various relationships to distribute their product to a wide

consumer base. *See* Timothy F. Bresnahan, Jason P. David, and Pai-Ling Yin, *Economic Value Creation in Mobile Applications*, UNIVERSITY OF CHICAGO PRESS (July 2015). Available at http://www.nber.org/chapters/c13044.pdf (writing "[t]he rapid growth of mobile devices has been accompanied by an equally rapid growth in app development, in substantial part because platform providers Apple and Google have lowered the costs of development and distribution of mobile applications."). Much more complex than a direct developer-consumer exchange, software companies used distributors to reach and engage with end users. Developers had to sacrifice valuable time from product development to establish relationships with distributors and were beholden to strict and costly rules even before they made their products available to consumers. Today, the app economy represents $568.47 billion of the United States' economy and has 317,673 companies active in the U.S.'s mobile app market; the app economy is also responsible for creating 5,744,481 American jobs. *See* Deloitte Study.

In simplest terms, independent software developers either paid to offload the overhead to a publisher or absorbed the cost and uncertainty of sales internally. These barriers to entry impacted hundreds of thousands of software developers and companies around the world; thus resulting in higher prices and fewer choices for consumers.

While the concept of mobile platforms existed in both BlackBerry and WindowsCE, it did not gather steam until 2008, when Petitioner paired its then-new iPhone with an integrated application storefront. Multiple companies quickly followed Petitioner's direction and launched stores

or marketplaces designed for various products. This created an entirely new internet-enabled economy that incorporated small businesses and reduced financial and temporal costs for developers.

As we alluded to earlier, software companies incurred an extraordinary financial burden to bring their products to market before the introduction of mobile platforms. For instance, they had to engage in costly and time-consuming marketing campaigns to establish consumer trust and contract others to process financial transactions for them. Adam Jaffe & Benjamin Jones, *The Changing Frontier: Rethinking Science and Innovation Policy*, National Bureau of Economic Research (2015) Available at https://books.google.com/books?id=QdopCwAAQBAJ&pg. Platforms have since created a one-stop shop that mitigates these costs so that more small businesses, like our members, can take part in the app economy. *See id.* At p. 238 (2015) (writing "[t]he rapid emergence of many demanders, together with the very low barriers of entry created by the platform providers, has led to a rapid and very substantial expansion in the number of overall apps.").

In the late '90s, a software company had to spend about $10 million just to get up and running. *See* TEDx Talks, The New Startup Economics: Stephen Forte at TEDxHKUST, Youtube (Apr. 2, 2013), https://www.youtube.com/watch? v=t4IiYEtJU_s.

Today, the advent of free or inexpensive cloud services, internet connectivity, and software tools have enabled small-business app developers to bring their innovative products to market with just a $100,000 check. *See id.*

Platforms help lower the barrier to entry for small app companies by shouldering the costs of privacy measures, security, and intellectual property protections for their users, thereby freeing up substantial amounts of capital that startups can use to build and grow their business.

With lower costs and barriers to entry, both fledgling and established app developers can succeed. For example, French educational app company L'Escapadou secured 1.3 million downloads and earned more than $1.5 million from app sales. Steve Young, *Making $1.5 Million with Educational Apps with Pierre Abel*, App Masters (Apr. 30, 2015) Available at: http://bit.ly/2hgDzZH. Founder Pierre Abel specialized the language, content, and pricing of each of his apps based on consumers and market needs and marketed them on different platforms to reach a variety of consumers around the world. L'Escapadou attributes its success to the centralized nature of platforms. *See id.*

This lower overhead is why the app economy is highly competitive and one of the most innovative spaces on the internet-enabled ecosystem. *See* Deloitte Study (finding a causal relationship between app developers' lowered overhead through the use of mobile platforms and the app economy's success). For example, Petitioner's App Store provides a service that eases financial transactions (such as billing to consumers) and provides consumers assurances that all the apps sold are compliant with relevant tax codes—something that software developers had to handle themselves. Popular platforms also may choose to absorb credit card fees to prevent them from transferring the cost to the developer. Without this platform-enabled service, it would fall on the app developer to handle each transaction; again, falling outside the bounds of an app developer's

core competencies which, at times, is almost exclusively limited to writing the code for their app.

2. Platforms give app developers instant access to international markets

Successful platforms, like Petitioner's App Store or Google Play, have changed the app ecosystem by providing app developers ubiquitous access to a broader swath of consumers. Platforms provide a centralized framework for app developers to engage and secure visibility with the 3.4 billion app users worldwide. Hugo Delgado, *The App Economy Forecast: A $6 Trillion Market in the Making*, App Annie (2017) Available at: http://bit.ly/2xfDqtB. For instance, Petitioner's App Store is available in 155 countries around the globe. Ketan Pratap, *Apple Says Developers Earned Over $70 Billion Since App Store's Launch*, Gadget 360 (Jun. 1, 2017) http://gadgets.ndtv.com/apps/news/apple-says-app-store-earned-developers-70-billion-since-launch-1706781. By Petitioner hosting an app company's product on its platform, that app company now has immediate access and reach to the same markets as Petitioner for a nominal fee without having to build a brick-and-mortar store or pay for an expensive an international ad campaign.

3. Before platforms, app developers struggled to build trust with end users

In the internet economy, end user trust – an established relationship between the app company and consumer where the consumer demonstrates confidence to disclose otherwise personal information to an app company – is extremely difficult to earn and maintain, especially

when a single incident (e.g., a breach or cyberattack) can permanently damage a business's trust easily with their customer. However, for a small business app developer, this event can easily spell death for their company. While brick-and-mortar retailers may be able to operate without the use of most of a customer's personal information, app companies need different types of personal information to develop and provide their innovative services to customers (e.g., geolocation data, financial information, health data). App companies are also different in that, without end user trust, consumers are unlikely to disclose essential information to an app company. Therefore, consumer trust and willingness to share information are critical for an app developer to succeed in the market, more so than for brick-and-mortar.

Even before the advent of digital commerce, consumer trust was a critical aspect of a software developer's ability to bring a product to market. Erik Brynjolfssn & Michael Smith, *Frictionless Commerce? A Comparison of Internet and Conventional Retailers*, MIT (1999) Available at: http://bit.ly/2yrEJ8W (writing "[r]ecent scholars have argued that trust is among the most important components of any effective Internet marketing program."). Prior to platforms, software developers often had to hand over their products to companies with a significant reputation to break through the trust barrier. Even "shareware" products that could be digitally distributed would end up partnering with trusted brands to gain consumer trust. Stew Chyou, *The History of Shareware*, Thunderbolt (May 5, 2011) Available at: http://bit.ly/2xvPuJ7. For example, in 1996, developers of the computer game *Ultimate Doom* contracted with Chex cereal to augment its consumer base. Developers converted their game software to create

the child-friendly game Chex Quest. *See id.* Today, most games, like *Ultimate Doom*, are free to download on platforms in app form like Petitioner's App Store, Google Play, or game-specific, independent platform Steam. These platforms not only lower cost but can reach consumers beyond those who buy a particular brand of cereal or trusted product. Now, platforms are the trusted product.

But the trust mechanism provided by the platforms is not merely an aspect of size. Consumer trust requires constant maintenance and vigilance because a loss of trust hurts platforms and the developers that depend on them. Zack Whittaker, *Millions of Steam game keys stolen after hacker breaches gaming site*, ZDNet (2016), Available at: http://zd.net/2byBRLV (reporting "[t]he data also includes an estimated 3.3 million unique site and forum accounts."). The immediate consumer trust embedded into platforms' brands is worth billions of dollars. *The Economics Of Trust*, Forbes (2010), Available at: http://bit.ly/2wJr76Y (writing "[t]he reason why the U.S. is richer than Somalia is mostly not because of culture. The great thing about formal systems, when well designed, is that they make a little bit of public spirit, altruism or professionalism go a long way," says Paul Seabright, an economics professor at the University of Toulouse."). Platforms' trusted brands allow developers to clear the critical hurdle of achieving trust from consumer adoption.

4. Platforms strengthen intellectual property protections for app developers

In the age of retail software distribution, companies struggled to secure and protect their intellectual property from theft and copyright abuse. Platforms not only

provide an important framework for app companies to engage with consumers, but they also assist in preventing infringement of app companies' intellectual property. For example, Petitioner's platform provides a content dispute mechanism that allows app companies to submit a claim to connect with entities that have allegedly violated their intellectual property. Apple Inc., *iTunes App Store Content Dispute*, Available at: http://apple.co/2xrvK9c. While maintaining a database of all the apps it hosts, the platform provides a mechanism that reduces the hurdles companies must go through to tackle copyright infringement. *E.g.*, Dan Russell-Pinson, *OMG! Someone Copied My App. What Do I Do Now?*, ACT | The App Association (August 30, 2017) Available at: http://bit.ly/2wKvm23.

Without the dispute resolution mechanisms of platforms, app companies are often left with an untenable alternative: copyright infringement litigation in federal court. Federal litigation poses an oppressive burden on app developers, particularly small businesses with limited resources. Within these cases, the rightful owners of the copyright may be faced with several thousand dollars per month in legal fees, the expense of new license compliance, and months or years diverted from company matters, not to mention the cost if the litigation is unsuccessful. Kelly Johnson Swan, *United States: The True Cost of Defending Against Copyright Infringement Litigation*, Scott & Scott LLP (August 19, 2015) Available at: http://bit.ly/2xsdOvf. Platforms provide a vital, cost-effective avenue for app developers and copyright holders to dispute and address intellectual property theft and infringement.

B. By Ignoring the Roles of Market Participants in the App Economy, the Ninth Circuit's Functional Approach of the Direct Sellers Rule Implicitly Categorizes Petitioner as a Reseller of all Apps it Hosts on its Platform

The Ninth Circuit's decision at issue before this Court radically expanded the eligible parties that may seek antitrust class action relief against digital commerce companies that utilize the agency sales approach by baselessly disregarding the fact that Petitioner possesses no property right in an app developer's product. Under Section 4 of the Clayton Act, "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue...and shall recover threefold the damages by him sustained." 15 U.S.C. § 15(a). By virtue of the clause "any person," courts may apply the statute broadly. However, *Illinois Brick Co. v. Illinois* limited that definition by only permitting courts to grant antitrust standing under Rule 12(b)(6) if the plaintiff is the direct purchaser of the company that overcharged as opposed to "others in the chain of manufacture or distribution." 431 U.S. 720, 729 (1977).

In *Illinois Brick*, the State of Illinois sued a concrete block manufacturer, Illinois Brick, for allegedly fixing prices of concrete blocks. The manufacturer had sold the blocks to masonry contractors who used the blocks to build structures. Those contractors then subcontracted other companies to build those structures to later sell to the State of Illinois. The State then sued Illinois Brick for passing on its unlawful overcharge at both stages of the distribution chain; thus, driving up the State's

cost downstream when buying the structures from the contractors. In this case, this Court rejected the State's argument because, if it were to accept such an analysis, then it would make it almost impossible for a court to discern where the harm—in this case, an overcharged concrete block—actually occurred. Additionally, the policy behind this ruling was that holding indirect purchasers liable for passed-on overcharges would clog up the court system and lead to costly litigation haling in upstream and downstream actors unjustifiably. Milton Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term—1977*, 77 Colum. L. Rev. 979 (1977) (writing "the courts have no escape from drawing lines to exclude those damage claims which escalate defendants' liability beyond all reasonable bounds, produce an overkill, compel the courts to engage in speculation in computing damages, and *clog the dockets with countless litigations*. Besides supporting a limited standing doctrine, these same policy considerations also undergird the Court's decisions in *Brunswick* and *Illinois Brick Co v. Illinois*. [emphasis added]"). Therefore, courts hold that direct-purchaser litigants are only allowed to bring an antitrust suit, meaning purchasers cannot sue entities from which they did not directly buy. *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990).

The essential question before the Ninth Circuit was whether the Respondent, when buying apps, was directly purchasing the app from the developer or the Petitioner. Petitioner argued that it does not sell apps but rather sells "software distribution services" to developers and, therefore, could not be both a distributor of apps and its purchaser. The Ninth Circuit dubiously dismissed this

claim by relying solely on the fact that app developers do not have a store of their own to sell their product. Put another way, according to the Ninth Circuit, app developers could only go through Petitioner if they wanted to sell their apps on the App Store. The court reasoned that because Petitioner presented the final price and consumers could only purchase the app through the App Store, Petitioner was the direct seller. Therefore, the Ninth Circuit's logic was that consumers are actually buying Apple's iPhone apps as opposed to buying from a third-party app developer because consumers could only buy from Petitioner's App Store when buying apps on an iPhone; therefore, according to the Ninth Circuit, Respondent can sue Petitioner under antitrust theory.

The Ninth Circuit's interpretation of consumers as direct buyers from the Petitioner in essence categorizes platform companies as mere resellers of apps; thus, unjustifiably providing the Petitioner and other platform companies with ownership rights in developers' apps to satisfy its conclusion. Under that interpretation, it would logically follow that the app developer would not be entitled to any profit from the consumer when purchased through Petitioner's platform because Petitioner would have owned the app at the time the consumer purchased it off of the App Store. This is factually inconsistent with the way in which the app developer and the Petitioner interact. In reality, within the developer-platform relationship, the Petitioner is only entitled to the agreed upon percentage of the app developers' app fee. Aside from this fee, the Petitioner has no ownership rights to the app. In addition, platform owners permit app developers to provide their apps on platforms not owned by the Petitioner, unencumbered by the Petitioner. All creative rights solely belong to the app

developer and are uninhibited by the Petitioner. Moreover, when a consumer agrees to "terms of service" for each app he or she purchases, the app's developer maintains sole responsibility for any breach of those terms. App developers are also solely responsible for any disruption in their service because of a lack of integrity in their code, and the onus rests on them to fix it. Thus, Petitioner is not a reseller of apps because it is not the owner of any third-party apps it hosts on its App Store.

Thus, the Ninth Circuit conflates two distinct properties to fit its narrative, which confuses the distinction of the entity from which the consumer purchased the app. *Illinois Brick* specifically sought to prevent this type of conflation by focusing on direct purchasers. However, the Ninth Circuit's "functional" test completely sidesteps *Illinois Brick*'s critical analysis, forcing this Court to determine whether, in the face of business and contract realities that say otherwise, our members are making apps for Apple or are independent innovators that are creating apps for their customers: the consumers. As we demonstrate above, it is unequivocally the latter.

II. The Ninth Circuit Misapplies *Illinois Brick*, and Would Allow Consumers to Interject into the Platform and App Developer Business Relationship

At the heart of the indirect-purchaser doctrine, the Court expressed concern of indirect purchasers taking issue with upstream negotiations and providing them the ability to object to the negotiated price from upstream agreements to which they were not a party. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968) (involving a shoe manufacturer alleging antitrust harm

against the company *directly* selling it a machine that, in part, makes its product and that its "practice of refusing to sell machines was an instrument of the monopolization.") (emphasis added). Key to analyzing this doctrine is to examine where the direct contractual relationship exists, put another way: who is selling to whom. *See id.* This means that, for purposes of antitrust standing, people or entities can only sue those companies that have direct control over the product and its pricing.

The District Court in this case, which the Ninth Circuit later overturned, accurately held that the *Illinois Brick* decision requires a careful evaluation of whether a plaintiff is claiming a harm based on direct interactions or pass-through damages. *In re Apple iPhone Antitrust Litig.*, No. 11-CV-06714-YGR, 2013 WL 6253147 (N.D. Cal. Dec. 2, 2013), rev'd and remanded sub nom. *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313 (9th Cir. 2017). We agree with the District Court's view that, simply, the court must evaluate who sets the price. The App Association also agrees with the District Court's determination that "any injury to Plaintiffs is an indirect effect resulting from the [influence of Petitioner's commission on] software developers' own costs," which could not be litigated without "speculat[ing] into developers' pricing structure, their costs, ability to find a distribution chain, and/or desired profits or rates of return." *See id.* at p. 6. The Ninth Circuit's assertion, reached through its self-created "functional" test, ignores these considerations that are integral for a court to determine who is the direct purchaser of whom for purposes of antitrust standing. *See id.*

Unfortunately, the Ninth Circuit's analysis misapplies *Illinois Brick* because it assigns to Petitioner the role of "distributor" without regard to whether Petitioner passed along the alleged overcharge and ran afoul to its precedent. In fact, *Delaware Valley Surgical Supply, Inc. v. Johnson & Johnson*—which the Ninth Circuit relies on heavily—demonstrates this point. In *Delaware Valley*, the distributor, Owens & Minor (O&M), negotiated the price paid to the producer. 523 F.3d 1116, 1122-23 (9th Cir. 2008). The Ninth Circuit in that case held that Bamberg Memorial Hospital (Bamberg) was *not* a direct purchaser of products from Johnson & Johnson because Bamberg paid O&M—a medical device distributor—directly and was, thus, its customer for purposes of antitrust standing. *See id.* at 1122. The Ninth Circuit went on to say that O&M was Johnson & Johnson's customer, because O&M purchased the products from it directly. Therefore, Bamberg could not sue Johnson & Johnson under section 4 of the Clayton Act because it had no contractual relationship with Johnson & Johnson in the context of the medical devices O&M sold to it. The key factor in this case was with which entity did the buyer contract.

The Ninth Circuit in this case explicitly ignores any distinction between the facts in *Delaware Valley* and the case at bar. In fact, the panel goes out of its way to acknowledge that app developers set their price, but then proceeds to say that it is irrelevant to its direct-purchaser analysis without elaborating as to why it is irrelevant or how *Delaware Valley* makes it irrelevant. *See In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 329 (9th Cir. 2017). Confusingly, it states later that, "[The panel] do[es] not address the question whether Apple sells distribution services to app developers within the meaning of *Illinois*

Brick." *See id. at* 330. This is absolutely baffling because these two factors are precisely what distinguishes the facts of this case from that of *Delaware Valley*. Mostly because these two factors place the consumer as the app developer's direct customer not Petitioner's as we explain below.

In this case, app developers, like our members, set the price of their apps and pass through the cost of the Petitioner's distribution service to their consumers. In *Delaware Valley*, O&M's role as a price negotiator is key to the analysis because the only reason for such a Clayton Act complaint in the first place is the price itself. In the instant case, Petitioner passes on the cost of the app. The factors at play leading to the decision to set an app's price—for example, labor, intellectual property, Petitioner's commission, and demand—are outside Petitioner's scope and entirely subject to the app developer's judgment. It is clear from their initial complaints at the District Court level that the parties at bar take issue with our members' pricing of their products and terms within their almost ten-year negotiation with Petitioner (i.e., Petitioner's 30 percent charge). *In re Apple iPhone Antitrust Litig.*, No. 11-CV-06714-YGR, 2013 WL 6253147, at 1-2 (N.D. Cal. Dec. 2, 2013), rev'd and remanded sub nom. *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313 (9th Cir. 2017); *see also*, ACT | The App Association, *The Symbiotic Relationship Between App Developers and Platforms: A Ten-Year Retrospect*, Website (last checked, August 7, 2018). Available at: http://actonline.org/wp-content/uploads/2018_ACT-App-Store-Ten-Year-Retro-Doc.pdf.

To offset the costs of running its App Store, the Petitioner issues a 30 percent fee on apps that have an

upfront subscription or in-app purchases. For each year thereafter, the Petitioner lowers its fee to 15 percent, yielding an 85 percent profit for the app developer. *See* App Store Guidelines. Outside of the App Store, however, app developers can collect 100 percent of their profits from sales or subscriptions, *See id.*; but their sales are often lower because it is difficult to reach the same volume of consumers outside of a large, centralized app platform. Hugo Delgado, ***The App Economy Forecast: A $6 Trillion Market in the Making***, App Annie (2017) Available at: http://bit.ly/2xfDqtB (reporting that global mobile commerce is outpacing other forms of monetization and growing at a 38% compound annual growth rate). App developers can also offer their products free of charge if they so choose. *See* App Store Guidelines. In fact, roughly 90 percent of apps made available on the App Store platform are free. ***See Distribution of Free and Paid Apps in the Apple App Store and Google Play as of 1st Quarter*** 2018, Statista (last checked Jul. 11, 2018) available at: https://www.statista.com/statistics/263797/number-of-applications-for-mobile-phones/; ***see also***, Sarah Perez, ***Paid Apps on the Decline: 90% of iOS Apps Are Free, Up From 80-84% During 2010-2012, Says Flurry***, TechCrunch (Jul. 18, 2013), https://techcrunch.com/2013/07/18/paid-apps-on-the-decline-90-of-ios-apps-are-free-up-from-80-84-during-2010-2012-says-flurry/. In this case, the Respondent seeks to object to terms our members have with Petitioner and refuse to acknowledge that the various pricing structures our members offer on Petitioner's platform.

If the Court accepts the Ninth Circuit's interpretation, then it is endorsing the idea that consumers can object to terms from upstream negotiations, having one of two

effects for our member companies: (1) to mitigate the threat of consumers suing platform companies for prices of apps, platform companies will engage in setting the price for our member companies' products or at least want more control over that aspect of their business models; or (2) platforms will not impose their nominal fees and, by extension, the services that come with it. *See Supra* I.A.1-4. The former situation would force app developers to release control over how they price their products. However, the latter produces losers at each stage because app developers would then have to absorb the exorbitant overhead costs they experienced before the advent of mobile platforms. *See id.* In either scenario, these results could yield fewer choices and higher prices for the consumers buying apps on mobile platforms, Petitioner's included.

As stated before, the court in *Delaware Valley* did not make this mistake and neither should this Court in the instant case. If *Illinois Brick* has any meaning, courts must avoid blindly categorizing an entity as a "distributor" that antitrust plaintiffs can sue without more deeply considering the distributor's role. Thus, the Court should overturn the Ninth Circuit's mistake here.

CONCLUSION

For the aforementioned reasons, we respectfully ask the Court to overturn the Ninth Circuit's decision in this case.

Respectfully submitted,

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